UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOHN WRIGHT, Plaintiff, v. MICHAEL J. ASTRUE, Commissioner of Social Security, Defendant.	NO. EDCV 10-400 SS **MEMORANDUM DECISION AND ORDER**

Plaintiff John Wright("Plaintiff") brings this action seeking to overturn the decision of the Commissioner of the Social Security Administration (hereinafter the "Commissioner" or the "Agency") denying his application for Supplemental Security Income ("SSI") disability benefits. Alternatively, he asks for a remand. The parties consented, pursuant to 28 U.S.C. § 636(c), to the jurisdiction of the undersigned United States Magistrate Judge. Pursuant to the Court's Order Regarding Further Proceedings, the parties filed separate memoranda in support of their respective positions. For the reasons stated below, the decision of the Commissioner is REVERSED and REMANDED for further administrative proceedings.

THE FIVE-STEP SEQUENTIAL EVALUATION PROCESS

To qualify for disability benefits, a claimant must demonstrate a medically determinable physical or mental impairment that prevents him from engaging in substantial gainful activity[1] and that is expected to result in death or to last for a continuous period of at least twelve months. Reddick v. Chater, 157 F.3d 715, 721 (9th Cir. 1998) (citing 42 U.S.C. § 423(d)(1)(A)). The impairment must render the claimant incapable of performing the work he previously performed and incapable of performing any other substantial gainful employment that exists in the national economy. Tackett v. Apfel, 180 F.3d 1094, 1098 (9th Cir. 1999) (citing 42 U.S.C. § 423(d)(2)(A)).

To decide if a claimant is entitled to benefits, an Administrative Law Judge ("ALJ") conducts a five-step inquiry. 20 C.F.R. §§ 404.1520, 416.920. The steps are:

(1) Is the claimant presently engaged in substantial gainful activity? If so, the claimant is found not disabled. If not, proceed to step two.

(2) Is the claimant's impairment severe? If not, the claimant is found not disabled. If so, proceed to step three.

(3) Does the claimant's impairment meet or equal one of list of specific impairments described in 20 C.F.R. Part 404,

[1] Substantial gainful activity means work that involves doing significant and productive physical or mental duties and is done for pay or profit. 20 C.F.R. §§ 404.1510, 416.910.

Subpart P, Appendix 1 (the "Listings")? If so, the claimant is found disabled. If not, proceed to step four.

(4) Is the claimant capable of performing his past work? If so, the claimant is found not disabled. If not, proceed to step five.

(5) Is the claimant able to do any other work? If not, the claimant is found disabled. If so, the claimant is found not disabled.

Tackett, 180 F.3d at 1098-99; see also Bustamante v. Massanari, 262 F.3d 949, 953-54 (9th Cir. 2001) (citing Tackett, 180 F.3d at 1098-99); 20 C.F.R. §§ 404.1520(b) - 404.1520(g)(1) and 416.920(b) - 416.920(g)(1).

The claimant has the burden of proof at steps one through four, and the Commissioner has the burden of proof at step five. Bustamante, 262 F.3d at 953-54 (citing Tackett, 180 F.3d at 1098). Additionally, the ALJ has an affirmative duty to assist the claimant in developing the record at every step of the inquiry. Id. at 954. If, at step four, the claimant meets his burden of establishing an inability to perform past work, the Commissioner must show that the claimant can perform some other work that exists in "significant numbers" in the national economy, taking into account the claimant's residual functional capacity ("RFC"),[2] age, education, and work experience. Tackett, 180 F.3d at 1098, 1100; Reddick, 157 F.3d at 721; 20 C.F.R. §§ 404.1520(g)(1),

[2] Residual functional capacity is "what [one] can still do despite [his] limitations" and represents an "assessment based upon all of the relevant evidence." 20 C.F.R. §§ 404.1545(a), 416.945(a).

416.920(g)(1). The Commissioner may do so by the testimony of a vocational expert ("VE") or by reference to the Medical-Vocational Guidelines appearing in 20 C.F.R. Part 404, Subpart P, Appendix 2 (commonly known as "the Grids"). Osenbrock v. Apfel, 240 F.3d 1157, 1162 (9th Cir. 2001) (citing Tackett, 180 F.3d at 1100-01). When a claimant has both exertional (strength-related) and nonexertional limitations, the Grids are inapplicable and the ALJ must take the testimony of a vocational expert. Moore v. Apfel, 216 F.3d 864, 869 (9th Cir. 2000) (citing Burkhart v. Bowen, 856 F.2d 1335, 1340 (9th Cir. 1988)).

THE ALJ'S DECISION

The ALJ applied the five-step sequential evaluation process. At the first step of the evaluation process, the ALJ found that Plaintiff had not engaged in substantial gainful activity since his application date. (Administrative Record ("AR") 12). At step two, the ALJ found that Plaintiff's lumbar sprain/strain, lumbar degenerative disc disease, cervical sprain/strain and affective disorder were severe impairments. (Id.). At step three, the ALJ found that the impairments, individually or in combination, did not meet or equal any of the Listings. (Id.). After considering Plaintiff's symptoms and the medical opinions, the ALJ concluded that Plaintiff had the RFC "to perform light work" as defined in 20 C.F.R. § 416.967(b) with certain limitations. (AR 13-16). The ALJ found that Plaintiff could stand or walk only two hours out of an eight-hour day, fifteen to thirty minutes at a time, using a cane as needed. (AR 13). Plaintiff could sit for six hours out of an eight-hour day, with normal breaks every two hours and the allowance to stand

and stretch for three minutes every hour. (Id.). Plaintiff could occasionally stoop and bend, but could not climb ladders, work at heights, or balance. (Id.). Plaintiff could engage in occasional neck motion, with his head in a comfortable position most of the time, but was precluded from extremes of motion and could only occasionally maintain a fixed head position for fifteen to thirty minutes at a time. (Id.). Plaintiff was limited to simple, repetitive goal-oriented work with no production rate pace work. (Id.). At step four, the ALJ found that Plaintiff was incapable of performing any past relevant work. (AR 16). At step five, the ALJ found that Plaintiff could perform other work as a charge account clerk (Dictionary of Occupational Titles ("DOT") 205.367-014) and was therefore not disabled within the meaning of the Social Security Act. (AR 17).

STANDARD OF REVIEW

Under 42 U.S.C. § 405(g), a district court may review the Commissioner's decision to deny benefits. The court may set aside the Commissioner's decision when the ALJ's findings are based on legal error or are not supported by substantial evidence in the record as a whole. Aukland v. Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001) (citing Tackett, 180 F.3d at 1097); Smolen v. Chater, 80 F.3d 1273, 1279 (9th Cir. 1996) (citing Fair v. Bowen, 885 F.2d 597, 601 (9th Cir. 1989)).

"Substantial evidence is more than a scintilla, but less than a preponderance." Reddick, 157 F.3d at 720 (citing Jamerson v. Chater, 112 F.3d 1064, 1066 (9th Cir. 1997)). It is "relevant evidence which a reasonable person might accept as adequate to support a conclusion."

Id. (citing Jamerson, 112 F.3d at 1066; Smolen, 80 F.3d at 1279). To determine whether substantial evidence supports a finding, the court must "'consider the record as a whole, weighing both evidence that supports and evidence that detracts from the [Commissioner's] conclusion.'" Aukland, 257 F.3d at 1035 (quoting Penny v. Sullivan, 2 F.3d 953, 956 (9th Cir. 1993)). If the evidence can reasonably support either affirming or reversing that conclusion, the court may not substitute its judgment for that of the Commissioner. Reddick, 157 F.3d at 720-21 (citing Flaten v. Sec'y, 44 F.3d 1453, 1457 (9th Cir. 1995)).

DISCUSSION

Plaintiff contends that the ALJ erred for three reasons: (1) the ALJ's reliance on the VE's testimony that Plaintiff was capable of performing other work as a charge account clerk was improper because the VE's opinion deviated from the DOT and the VE did not explain the deviation; (2) the ALJ did not properly consider the treating doctors' findings; and (3) the ALJ did not properly consider the consultative examiner's opinion. (Memorandum in Support of Plaintiff's Complaint at 2-10). This Court agrees that the ALJ's failure to explain the deviation between the VE's testimony and the DOT description of the requirements of a charge account clerk created an unresolved potential inconsistency in the evidence and remands this action on that basis. As the Court determines that remand is required on this basis alone, the Court declines to address Plaintiff's alternative arguments.

The ALJ Erred By Failing Explain The Deviation Between The VE's Testimony And The DOT Description Of Charge Account Clerk In Determining That Plaintiff Could Perform Other Work

Plaintiff contends that the ALJ improperly relied on the VE's opinion that he was capable of performing other work as a charge account clerk. (Memorandum in Support of Plaintiff's Complaint at 2). Specifically, Plaintiff argues that the reasoning skills required of a charge account clerk as defined in the DOT exceed the ALJ's RFC assessment limiting Plaintiff to simple, repetitive tasks. (Id. at 2). Plaintiff concludes that because neither the ALJ nor the VE explained this deviation from the DOT, reversal or remand is appropriate. (Id. at 5). The Court agrees and remands.

Social Security regulations provide that DOT classifications are rebuttable by recognizing "vocational experts and several published sources other than the DOT as authoritative." Johnson v. Shalala, 60 F.3d 1428, 1435-36 (9th Cir. 1995); see also 20 C.F.R. §§ 404.1566(d)(2)-(5), (e) (the use of vocational experts is particularly important where "the issue in determining whether you are disabled is whether your work skills can be used in other work and the specific occupations in which they can be used, or there is a similarly complex issue"). Although evidence provided by a VE is generally expected to be consistent with the DOT, "[n]either the DOT nor the VE evidence automatically 'trumps' when there is a conflict." Social

Security Ruling ("SSR") 00-4p;[3] Massachi v. Astrue, 486 F.3d 1149, 1153 (9th Cir. 2007). The ALJ may rely on expert testimony that contradicts the DOT if the record contains persuasive evidence to support the deviation. See Tommasetti v. Astrue, 533 F.3d 1035, 1042 (9th Cir. 2008). Furthermore, the ALJ must definitively explain the deviation. Pinto v. Massanari, 249 F.3d 840, 847 (9th Cir. 2001). Evidence sufficient to permit deviation may be "either specific findings of fact regarding claimant's residual functionality, or inferences drawn from the context of the expert's testimony." Light v. Social Sec. Admin., 119 F.3d 789, 793 (9th Cir. 1997) (internal citations omitted).

At the hearing, the ALJ posed a hypothetical to the VE that included the assumption that the person would be limited to simple, repetitive tasks. (AR 107). In response, the VE testified that Plaintiff was not capable of performing any past relevant work and that the only other work Plaintiff could perform was as a charge account clerk, DOT 205.367-014. (AR 108). The VE further affirmed that his testimony complied with the DOT. (AR 109). The ALJ relied on the VE's representation and did not question the VE about any apparent deviations between his testimony and the DOT. (Id.).

According to the DOT, the position of charge account clerk requires level three reasoning skills on the scale of General Education

[3] Social Security Rulings do not have the force of law. Nevertheless, they "constitute Social Security Administration interpretations of the statute it administers and of its own regulations," and are given deference "unless they are plainly erroneous or inconsistent with the Act or regulations." Han v. Bowen, 882 F.2d 1453, 1457 (9th Cir. 1989).

Development ("GED"). DOT 205.367-014, 1991 WL 671715. The DOT defines level three reasoning skills as the ability to "[a]pply commonsense understanding to carry out instructions furnished in written, oral, or diagrammatic form. Deal with problems involving several concrete variables in or from standardized situations." DOT Appendix C, Section III, 1991 WL 688702. The weight of authority in the Ninth Circuit holds that level three reasoning skills as defined in the DOT are incompatible with a limitation to simple, repetitive tasks. As the court in Torrez v. Astrue, 2010 WL 2555847 (E.D. Cal. June 21, 2010) noted:

> Several district court cases in this circuit question whether a claimant limited to simple, repetitive tasks, is capable of performing jobs requiring level three reasoning under the DOT. In McGensy v. Astrue, 2010 WL 1875810 (C.D. Cal. May 11, 2010), the Court noted that while case law has held that "a limitation to 'simple, repetitive tasks' is consistent with level two reasoning," this restriction is "inconsistent" with the requirements for level three reasoning, in particular the job of mail clerk. Id. at *3 (citing Pak v. Astrue, 2009 WL 2151361 at *7 (C.D. Cal. July 14, 2009) ("The Court finds that the DOT's Reasoning Level three requirement conflicts with the ALJ's prescribed limitation that Plaintiff could perform only simple, repetitive work."); Tudino v. Barnhart, 2008 WL 4161443 at *11 (S.D. Cal. Sept. 5, 2008) ("[l]evel-two reasoning appears to be the breaking point for those individuals limited to performing only simple repetitive tasks"; remand to ALJ to "address the conflict between Plaintiff's limitation to 'simple, repetitive tasks' and the

> level-three reasoning"); Squier v. Astrue, 2008 WL 2537129 at *5 (C.D. Cal. June 24, 2008) (reasoning level three is "inconsistent with a limitation to simple repetitive work")). In addition, in Bagshaw v. Astrue, 2010 WL 256544 at *5 (C.D. Cal. January 20, 2010), the court expressly cited Hackett [v. Barnhart, 395 F.3d 1168, 1176 (10th Cir. 2005)] in concluding that a mail clerk job, which requires level three reasoning under the DOT, was "inconsistent with [the plaintiff's] intellectual functional capacity limitation to simple, routine work."[4]

Id. at *8 (concluding that "the DOT precludes a person restricted to simple, repetitive tasks, from performing work . . . that requires level three reasoning"); see also Lara v. Astrue, 305 Fed. Appx. 324, 325 (9th Cir. 2008) (finding that reasoning levels one and two are commensurate with a limitation to simple, repetitive tasks).

The VE's determination that Plaintiff is capable of working as a charge account clerk, which according to the DOT requires level three reasoning ability, therefore conflicts with decisions that find that level three reasoning skills are generally beyond the capacity of persons limited to simple, repetitive tasks. When there is an apparent conflict between the testimony of the VE and the definitions contained in the DOT, the ALJ must ask the VE to explain the deviation. Massachi, 486 F.3d at 1153 (citing Social Security Ruling 00-4p). Here,

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[4] In Hackett, the Tenth Circuit stated that a restriction to "simple and routine work tasks . . . seems inconsistent with the demands of level-three reasoning." Hackett, 395 F.3d at 1176.

notwithstanding the apparent conflict, the ALJ did not seek an explanation from the VE. Consequently, the ALJ's written determination provides no explanation as to how to resolve the conflict created by the vocational expert's identification of a potential occupation which the DOT indicates requires reasoning abilities beyond the capacity of a person limited to simple, repetitive tasks. As a result, the Court cannot accept the ALJ's determination, which relies on the vocational expert's testimony, that there are positions in the national economy available to Plaintiff. Without more, the Court cannot determine whether substantial evidence supports the ALJ's decision.

Remand for further proceedings is appropriate where additional proceedings could remedy defects in the Commissioner's decision. See Harman v. Apfel, 211 F.3d 1172, 1179 (9th Cir. 2000). Upon remand, the ALJ must either address the conflict between the VE's determination that Plaintiff is capable of working as a charge account clerk and the DOT's description of that position as requiring level three reasoning skills, which are normally beyond the capabilities of a person restricted to simple, repetitive tasks, or obtain further VE testimony regarding alternative occupations that Plaintiff could perform.

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CONCLUSION

Accordingly, **IT IS HEREBY ORDERED** that the decision of the Commissioner is **REVERSED** and **REMANDED** for further proceedings consistent with this decision.

DATED: November 3, 2010

/S/
SUZANNE H. SEGAL
UNITED STATES MAGISTRATE JUDGE